

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA,)
v. Plaintiff,) Criminal Action
DZHOKHAR A. TSARNAEV, also) No. 13-10200-GAO
known as Jahar Tsarni,)
Defendant.)

BEFORE THE HONORABLE GEORGE A. O'TOOLE, JR.
UNITED STATES DISTRICT JUDGE

LOBBY CONFERENCE

John J. Moakley United States Courthouse
Courtroom No. 9
One Courthouse Way
Boston, Massachusetts 02210
Tuesday, June 23, 2015
2:05 p.m.

Marcia G. Patrisso, RMR, CRR
Official Court Reporter
John J. Moakley U.S. Courthouse
One Courthouse Way, Room 3510
Boston, Massachusetts 02210
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Mechanical Steno - Computer-Aided Transcript

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PROCEDINGS

2 THE COURT: So I just wanted to convene before
3 tomorrow just to make sure we were all ready and knew what was
4 going to happen and so on and so forth. Can you, the
5 government, bring me up to date on what victims intend to speak
6 or can you give us a list or something like that?

I know we have statements. You've submitted written statements.

9 MR. WEINREB: And there are a few more statements
10 that --

11 THE COURT: Just as a master of ceremonies I'm just
12 kind of interested.

13 MR. WEINREB: -- might have trickled in.

14 We have a list. It changes a little bit day by day
15 because people call in and add themselves or drop out. But we
16 can --

17 MS. PELLEGRINI: The latest one is pretty accurate.

18 THE COURT: I don't need one before tomorrow morning,
19 but before the proceedings if I could have one.

MS. CLARKE: If we could see it as well?

21 | MR. WEINREB: Yeah, of course we'll send it to you.

22 MS. CLARKE: We were wondering if we could actually
23 know the names -- I understand the reason for redacting the
24 names for public filing, but if we could know the --

THE COURT: I don't, actually. Why should the names

1 be redacted?

2 MR. WEINREB: Well, a lot of -- or many of the victims
3 indicated concern about having their names out there. Some of
4 them, you know, revealing quite personal information, others
5 are just worried about the publicity that would attach to their
6 names. And I think the First Circuit seemed to approve of a
7 procedure in which any -- although the statements are public,
8 the names need not be -- they can be appropriately redacted for
9 privacy reasons.

10 THE COURT: We had some of the most seriously injured
11 victims on the stand. Obviously they were exposing their
12 identity. I mean, I don't see --

13 MR. WEINREB: Other victims didn't testify precisely
14 because they didn't want to expose themselves.

15 MR. CHAKRAVARTY: And there were some victims who
16 received, like, tweets and other kinds of social media backlash
17 for -- outside of court, so it wasn't their courtroom
18 testimony. So that's one of the reasons --

19 THE COURT: Is there any specific provision for
20 redaction or is this just general principles; that is, in the
21 victims' statute, for example?

22 MR. WEINREB: No, not in the victim statute. I mean,
23 I think the victim statute does talk about safeguarding the
24 privacy of victims. I would have to take a look at -- I think
25 there's more general language, nothing that specific.

1 MS. PELLEGRINI: The privacy maybe was indicated.

2 MR. WEINREB: But I do think that the government takes
3 the position, for example, that that statute does affect what
4 can be redacted in discovery, for example. I don't know that
5 that's ever been litigated or decided, but I do think that the
6 statute seems to embody principles of sensitivity to victims'
7 concerns for privacy.

8 THE COURT: Does that include people who will speak in
9 public proceedings?

10 MR. WEINREB: When you say that --

11 THE COURT: Tomorrow. Meaning redactions.

12 MR. WEINREB: The redactions were done for all of the
13 statements --

14 THE COURT: Will they identify themselves to me
15 tomorrow?

16 MR. WEINREB: Yes, they will.

17 THE COURT: So that will be in the public record?

18 MR. WEINREB: That will be on the record, yes. As
19 always, there's a difference between having it in writing and
20 having it just said. But we will -- we're happy to share with
21 the defense all of the information with the understanding that
22 it's, you know, pursuant to a protective order.

23 THE COURT: Yeah.

24 MR. WEINREB: And as of now there are only a few
25 victims who plan to speak who have not submitted written

1 statements, and I believe at this point it is only the Richard
2 family, the Campbell family and Mark Fucarile's stepfather.

3 THE COURT: I'd like you to remind the victims, if you
4 haven't already, that their address is to me, not to the
5 defendant.

6 MR. WEINREB: Right. So we have told all of them that
7 we would like to meet with them to advise them on these things,
8 and that's one of the things we'll tell them.

9 THE COURT: They will be obviously standing in the
10 public courtroom where everyone can see them. They will also
11 be subject to the broadcast to the other courtrooms, as I'm
12 sure you'll tell them. And as I understand the technology,
13 there will be a general courtroom shot and there will be a
14 picture within the picture of the speaking person, whether it's
15 me on some occasion or the victim or whoever.

16 MR. WEINREB: I should say, your Honor, we have and
17 will advise the victims to address their comments to the Court;
18 however, some of those comments may be addressed to the
19 defendant in the sense that people want to say to the
20 defendant, you know, "I want you to know that this did not" --
21 you know, "You did not succeed in destroying our lives. We're
22 going to get past this," that sort of thing. But it will be
23 said to you as opposed to him personally.

24 MS. CLARKE: It literally should be said to the judge
25 that they want the Court to know that their lives are moving

1 on.

2 THE COURT: Yes, I prefer that strongly.

3 MR. WEINREB: Well, that can be hard for people who
4 are not accustomed to public speaking, to inform them --

5 THE COURT: I know, but I think you have to emphasize
6 it to them, that's why I bring it up, that it's addressing the
7 Court, the theory, of course, being that it aids the Court's
8 decision, the extent the Court has judgment. And that's the
9 purpose of the victim statements, that they enlighten the
10 judgment process, not that they're -- I understand they have
11 the collateral effect of catharsis, perhaps, but that's not
12 their primary purpose.

13 MR. MELLIN: One other thing, Judge, is we'll instruct
14 them not to express their personal opinion about what they
15 think the punishment should be in this case.

16 THE COURT: Okay. Thank you.

17 Now, we kind of detoured, I think, Ms. Clarke, from
18 what you -- I interrupted you to get on to the redaction issue.
19 Did you cover --

20 MS. CLARKE: I just was going to ask if we could be
21 given the names of the individuals because our copies were
22 redacted as well.

23 MR. MELLIN: And, your Honor, we'll provide the names
24 as well as there is a victim identification number.

25 Do you have the victim identification number on some

1 of those statements?

2 MS. CLARKE: Yes.

3 MR. MELLIN: Say Stephanie Benz, we'll give you her
4 name and also the victim number.

5 MS. CLARKE: On the list? And then we can compare.

6 THE COURT: And correlate it from there.

7 MS. CLARKE: I do notice that many of them had no
8 objection to their names being public, even on their writings.

9 THE COURT: Well, I'm satisfied for the time being if
10 the people who speak in public are identified. The paper issue
11 is separate and I don't think we have to resolve that if all
12 the people who will be present in addressing me will tell me
13 who they are.

14 So we had set last Wednesday, I guess, the 17th for
15 any submissions from anybody and we didn't get any.

16 MR. WEINREB: We don't plan to make a written
17 submission.

18 MS. CLARKE: A submission about?

19 MR. WEINREB: A sentencing memorandum.

20 THE COURT: Anything. A sentencing memo, brief.

21 MS. CLARKE: That ship sort of sailed, I think.

22 THE COURT: I think so too but I just want to confirm
23 it. I just don't want to get something in at eight o'clock
24 tomorrow morning.

25 MS. CLARKE: There was one issue that the presentence

1 report indicates at the end, I believe, that the government
2 will submit to the Court a date upon which it should consider
3 restitution?

4 THE COURT: Well, okay. Let's get to restitution.
5 What's your view on restitution?

6 MR. WEINREB: So what we would ask the Court to do is
7 to enter an order of restitution at the time of sentencing with
8 the amount to be determined at a hearing within 90 days, which
9 I believe the statute permits. So the restitution will be made
10 part of the sentence and pronounced as part of the sentence but
11 the amount will be calculated later.

12 THE COURT: Okay. What are your intentions?

13 MR. WEINREB: With respect to restitution? We are
14 already soliciting from the victims and others the information
15 that is normally presented to support an order for restitution.
16 It's mandatory. Restitution is a mandatory part of the
17 sentence.

18 THE COURT: Well, but the statute does permit it to be
19 omitted if the calculation is too burdensome.

20 MR. WEINREB: That's correct. But we don't believe it
21 is too burdensome. We're going to collect the information.

22 MR. CHAKRAVARTY: Your Honor, just to alert the Court
23 to an issue that might arise later, but one of the reasons why
24 restitution is important here, to the extent that in the future
25 the defendant seeks to profit from these activities, that

1 restitution order is a key vehicle to be able to make the
2 victims whole.

3 MS. CLARKE: I'm not sure that's correct because
4 there's a profits statute that allows the government to seize
5 profits, which is so beyond the pale at this point. But if
6 there were profits, the government can seize them under
7 32- -- I don't have the statute in front of me, but there is
8 a -- sort of a Son of Sam profits -- special forfeiture statute
9 that allows you to do that without an order of restitution,
10 Judge. We're going to have to --

11 THE COURT: 3681.

12 MS. CLARKE: 3681. You remembered it and I just read.

13 MR. CHAKRAVARTY: Which, I'd suggest, is not
14 necessarily coextensive with the restitution.

15 MS. CLARKE: We're going to object to an order of
16 restitution on *Apprendi* grounds, but we also think that the
17 Court is correct that it's burdensome to calculate and should
18 be --

19 THE COURT: I haven't actually said that. I raised
20 the question.

21 MS. CLARKE: Well, you know, it's an unrealistic thing
22 to ever get paid. You know, if the Court's going to order it,
23 we're going to object -- not if the Court is going to order it.
24 We're going to object on *Apprendi* grounds and that's a
25 percolating point in the circuit. Certainly the Supreme Court

1 just denied cert on that issue. But it has not been resolved
2 nationwide the question of whether *Apprendi* applies. I think
3 the rationale is pretty strong that is does so we will object
4 to the entry of an order of restitution. We also think that
5 it's just a bit crazy to order. It's a death sentence, it's a
6 life sentence after death. It's just not going to get paid.

7 MR. WEINREB: Your Honor, for all we know some, you
8 know, wealthy jihadi somewhere will decide that people who
9 martyr themselves for the cause deserve some kind of
10 compensation and will, you know, make some kind of gift to the
11 defendant. And I just think we can't foresee all possibilities
12 of what might happen here.

13 Restitution at this -- you know, regardless of whether
14 there's an *Apprendi* issue, which remains to be seen, right now
15 the law is that it's a mandatory part of the sentence if it can
16 be calculated without undue burden. We believe that it can be.
17 We're soliciting the information. And if it proves otherwise,
18 that's an issue we can deal with down the road. But at this
19 point there's no reason not to follow the ordinary course of
20 the law.

21 MS. CLARKE: The other thing that we want the Court to
22 consider in regard to any financial -- which includes special
23 assessment, and there have been five or six death sentences, I
24 believe, in which the courts just waived all financial burdens,
25 including the assessment, restitution and fines. But if the

1 Court is going to order the special assessments or, you know,
2 eventually restitution, we would ask that the Court order that
3 it come from earnings rather than the commissary account where
4 lawyers typically provide, you know, money each month so that
5 the client can buy shoes or soap or, you know, supplement the
6 food. The diet in the prison is not all that good. So that it
7 can come from, you know, what the government would be concerned
8 about rather than, you know, the legal teams and family members
9 providing money.

10 THE COURT: Doesn't the Inmate Financial
11 Responsibility Act or whatever it's called deal with that, you
12 can take some of the commissary money but not all?

13 MS. CLARKE: If the Court direct it come from
14 earnings, the Bureau of Prisons will comply with that.

15 THE COURT: Right. But in other words, they don't
16 scoop out the account.

17 MS. CLARKE: Well, they might. They scoop out
18 whatever they decide to scoop out. My last experience with the
19 prison was -- and this young man got just -- money from his
20 parents every month. And they figured out how much he needed
21 and would send it, and then the prison started taking 25 bucks
22 a month. So they had to adjust how much that they would send.
23 But the more they would send, the more they would take. So
24 it's a -- you end up having family and lawyers paying
25 restitution a nickel at a time which is really not, I don't

1 think, what it was aimed at. It's typically, you know, if a
2 guy gets a job in prison, they take it out of that. But when
3 these lifers or people facing death go, they don't get all
4 these jobs, so they don't have any source of income to pay it
5 other than, you know, family, lawyers.

6 MR. WEINREB: So the flip side of that consideration
7 is the one that we have raised, which is the possibility of
8 gifts being made to the defendant or money being sent to him by
9 essentially fellow travelers or sympathizers that could far
10 exceed what his parents or lawyers might send to him, and that
11 justly should go to paying a special assessment or restitution.
12 And so limiting it to earnings --

13 THE COURT: Let me just -- this disagreement should be
14 on the record tomorrow, I think, properly. I mean, I don't
15 want to be pre-deciding sentencing.

16 MS. CLARKE: But just to get in the Court's head.

17 THE COURT: But I'm glad you're flagging it. I
18 appreciate that. But I don't know that we have to resolve it.
19 But, I mean, I think you should make the argument in public
20 tomorrow.

21 MS. CLARKE: But the other flag I want to give to the
22 Court is that in one case what we did agree with the government
23 to do was create an amount below which the prison could not
24 take any funds, so that there was a cap on how much money the
25 individual could have, and then they could take restitution

1 beyond -- or special assessments beyond that. So perhaps
2 that's something --

3 MR. WEINREB: I mean, Ms. Clarke and I had spoken
4 earlier about possibly negotiating something but --

5 MS. CLARKE: Maybe we could do that afterwards.

6 MR. WEINREB: Okay.

7 THE COURT: Okay. Well, this gives me a partial
8 answer to one of my broader questions, which is neither of you
9 submitted a sentencing memoranda. There are apparently some
10 issues on which you each wish to be heard. Again, this is my
11 master of ceremonies --

12 MS. CLARKE: Well, restitution didn't seem to us to be
13 an issue because the presentence report said that the
14 government would be asking for a date -- the Court to set a
15 date to have a restitution hearing.

16 THE COURT: Anyway, we'll touch on that and perhaps
17 this other question of other financial issues. Are there other
18 matters of that sort that you think there will be some exchange
19 of views and argument on?

20 MR. WEINREB: Well, the other thing that we'll be
21 asking for tomorrow is for the Court to enter the order --
22 proposed order of forfeiture which we submitted. And I believe
23 that there are three steps, if anybody remembers what they are.
24 I can't exactly recall.

25 MS. PELLEGRINI: The Court has to pronounce it, and

1 the judgment --

2 MR. WEINREB: So there's a written order which we
3 submitted which we would ask be signed, and then the Court also
4 has to pronounce it orally as part of a sentence. I believe
5 that may be it.

6 MS. CLARKE: That was a motion that was filed.

7 THE COURT: Right.

8 MR. WEINREB: Right. It's a motion for forfeiture.
9 So the motion would have to be granted, the order entered and
10 the judgment pronounced.

11 MS. CLARKE: I think we kind of looked at that as a
12 two-week response time.

13 THE COURT: It's fairly common. I don't know about
14 the timing, but it's a fairly common procedure in criminal
15 cases here, anyway, that such motions are filed. They are
16 typically granted at the sentencing and -- or not, and the
17 preliminary order entered at the time, and it's part of the
18 proceedings and reflected in the judgment.

19 MS. CLARKE: Well, given that, we have to look at
20 forfeiture in the light of the *Apprendi* issue as well, and we
21 may just need to flag that for the Court. But that looked like
22 a two-week -- all of this looked like it was going to be put
23 off, that's why you didn't get anything from us.

24 THE COURT: Okay. So we have those sort of low end of
25 the judgment form issues, I guess is the way I would put it.

1 Will there be any major argument about the sentences over which
2 the Court potentially has some range of judgment?

3 MS. CLARKE: No.

4 THE COURT: I say "potential" because I don't think I
5 really do, the way it's been calculated. The statutes pretty
6 much control.

7 MR. WEINREB: Except there are only two counts I think
8 on which the Court has discretion.

9 THE COURT: Well, it could be four depending on how
10 you read it.

11 MR. WEINREB: Right, it could be. I think there was a
12 suggestion --

13 THE COURT: Again, I'm just trying to get -- this is
14 really courtroom management more than substance. I'm just --
15 when we've heard all the victims, typically the next step I
16 would turn to the government for argument, I would turn to the
17 defense for argument.

18 Does the defendant intend to say anything?

19 MS. CLARKE: We're still in conversation about that.

20 THE COURT: Could you let us know when you know?

21 MS. CLARKE: That would be last anyway, right.

22 THE COURT: Yes, last before me.

23 MR. WEINREB: So just to be clear, so the victims will
24 go first and then we'll resolve any disputes over issues, then
25 government argument, defense argument, and then the defendant

1 if he wishes to speak?

2 THE COURT: Right. Right.

3 MS. CLARKE: It looks like the victim speakers will be
4 standing behind government counsel tables, essentially?

5 THE COURT: Yes. I think we'll put -- one of the mics
6 will reach to there.

7 MR. WEINREB: There was some concern among some of the
8 victims that they be able to leave the courtroom after they
9 give their statements. Is the Court opposed to that?

10 THE COURT: Not if they can do it quietly.

11 MR. WEINREB: Okay. That's fine.

12 THE COURT: As I always do in criminal cases after a
13 verdict when there will be a sentencing, I invite jurors to
14 return if they wanted to. A number of them will. Because
15 there are a number of them, we were thinking of where to put
16 them because the courtroom is so filled. I'm actually going to
17 put them in the jury box. It's just a matter of courtesy.
18 They of course are not a jury. But as I say, it is my custom
19 to invite people, and once in a while they take me up on it,
20 but this jury did.

21 MS. CLARKE: You just want to give us all whiplash.

22 THE COURT: Anyway, I just wanted you to not be
23 surprised.

24 So the arrangement will be those people will be in the
25 box. The sketch artists will be where we put the alternates

1 when they are outside the box. That will give them a view of
2 the whole courtroom including the speaking victims.

3 MR. WEINREB: When the press sees the jury in the
4 courtroom, they will undoubtedly ask us for guidance on whether
5 they're enjoined from talking to them.

6 THE COURT: No, I don't think we've ever enjoined
7 them. I mean, the same rules apply. My advice to the jury is
8 be careful in their decision-making.

9 MS. CONRAD: I'm sorry. Enjoined from speaking to the
10 press?

11 MR. WEINREB: Explain to the jurors -- well, the
12 jurors were never enjoined from anything, but there was an
13 order that the Court issued --

14 THE COURT: The decorum order?

15 MR. WEINREB: No, not just that, but there was this
16 order that for administrative purposes the jury was still a
17 jury for 90 days, and the press, I think, many of them, were
18 concerned that that meant they couldn't talk to them for that
19 reason.

20 THE COURT: They should talk to their lawyers.

21 (Laughter.)

22 MS. CLARKE: There's a motion pending --

23 THE COURT: There is a motion. And so that's -- so
24 just to finish up on that, that is not the purpose of that
25 order. That order was to give them the benefit of the Employee

1 Assistance Program, so that they could -- the bureaucracy would
2 be satisfied they could extend that benefit to those people.
3 That's the only reason. The decorum order, I guess, expired.
4 Has it expired?

5 MS. CLARKE: You no longer have to have good behavior
6 in the courtroom?

7 (Laughter.)

8 THE COURT: We will bring the jurors up to their
9 position in the box through the back of the house -- the former
10 jurors -- just to prevent them from being assaulted by the
11 press. They'll have to leave on their own. They're going to
12 arrive on their own. They're not being bussed the way they
13 were. So they'll have to make their way safely home themselves
14 but --

15 MR. CHAKRAVARTY: Your Honor, their identity, both
16 their names as well as their likenesses, I think, also has not
17 been publicized, but the press will be concerned about that.

18 THE COURT: Well, there's no photography in the
19 courtroom. I guess the only implication is for the sketch
20 artists, and their sketches are such that...

21 MS. CLARKE: You can't tell.

22 THE COURT: You could have fooled me the past few
23 months.

24 MR. WEINREB: I'm not sure this should be public.

25 THE COURT: There were some that I didn't think looked

1 like me and I thought that's fine.

2 MR. WEINREB: Your sketches may suffer.

3 THE COURT: That's okay. I'm not invested in them.

4 So I don't think there are any formal restrictions with respect
5 to that, again.

6 MR. WEINREB: With respect to victims addressing the
7 Court, is it all right for family members to stand together?

8 THE COURT: Yes.

9 MS. CLARKE: Judge, I've just never heard this before
10 but admittedly I've not been in these shoes. Mr. Mellin
11 indicated that they would be advising victims not to express an
12 opinion to you as to what they felt what the appropriate
13 penalty was. I'm not sure what that comes from.

14 MR. MELLIN: Their personal opinions are irrelevant.
15 I mean, when they're talking about victim impact, it's the
16 impact on their lives.

17 THE COURT: I guess I took the earlier comment to be
18 relevant only to the death counts; that is, because the jurors
19 were final on that and I'm not making any judgment about that.
20 So I think as to those, it's inappropriate. As to the others,
21 I suppose, they could say, "Don't give him 25 years on the
22 carjacking." I suppose that's possible. I was focused on the
23 death counts. There's nothing to be said about that. I can't
24 do anything about it.

25 MS. CLARKE: Right. But I'm not sure that they can

1 have their opinions restricted. And not that, you know, it
2 weighs one way for either party or another, I just didn't know
3 that victims could be restricted in their opinions in a
4 sentencing hearing post-jury.

5 THE COURT: Well, as I said, strictly speaking, the
6 benefit to the system is to be that they can influence the
7 judgment that the Court might make that's within its range to
8 make. The death/life sentence issue as to those counts is not
9 mine to make so there's no range of judgment.

10 MS. CONRAD: That sort of calls into question -- I
11 mean, obviously, they have the right to speak and they should
12 be given the opportunity to speak, but to the extent you're
13 saying but it shouldn't influence -- they shouldn't express an
14 opinion about the sentence because then nothing they say would
15 be relevant to the sentence because the sentence has been
16 predetermined.

17 THE COURT: No, they can say things relevant to the
18 sentences about which I have to make the judgment.

19 MS. CLARKE: I don't think that their right is --

20 THE COURT: For example, one thing I get to decide is
21 concurrence or consecutiveness, some of which I get to decide,
22 some statutory. They could say something about that. But, you
23 know, saying, "We're glad the jury did what they did or we're
24 not glad the jury did what they did," I don't know that that --

25 MR. WEINREB: Anyway, nobody's instructing them not to

1 speak publicly their minds about any issue, it's simply what's
2 appropriate in the context of a sentencing hearing. And there
3 are many things that, you know, they might like to say,
4 especially to the defendant, which they won't be permitted to
5 say which also would have nothing to do with the sentence. I
6 think it's best we give them some principles that make sense
7 about what they should say and shouldn't say.

8 THE COURT: Let me just come back to one thing on the
9 restitution question. As I understand it, the marshals are
10 prepared to remove him from the district, and I've told them to
11 go ahead and do that. There's no contingency about
12 restitution. We're not going to have him hanging around while
13 that is debated. If it's necessary to bring him back for a
14 hearing we'll, I'm sure, be able to make the arrangements. It
15 may be that we could make long-distance arrangements as well if
16 there is a hearing. So I just wanted to tie that off, he'll be
17 leaving tomorrow.

18 MS. CLARKE: Does the Court have any indication where
19 he's going?

20 THE COURT: I don't.

21 MS. CONRAD: Does the government?

22 MR. WEINREB: No.

23 MS. CLARKE: And how quickly he's going?

24 THE COURT: He's going quickly.

25 MS. CLARKE: I mean, if we could know because we're

1 scheduling visits out with the prison here and --

2 THE COURT: It's -- I don't think anybody's ever told
3 me anything specific but I am surmising that it's probably late
4 tomorrow. But that's surmise.

5 MS. CLARKE: Okay.

6 THE COURT: I base that basically on the general tenor
7 of the concern that the marshals expressed about having to hold
8 on to him if a restitution hearing was being set. It sounds
9 like they were ready to go.

10 MR. MELLIN: I actually --

11 MR. WEINREB: I assume he's going to Terra Haute.

12 MR. MELLIN: I actually figured you would want to know
13 the answer to this question.

14 MS. CLARKE: You were supposed to tell me, yes.

15 MR. MELLIN: I've tried to look into this, and the
16 answer is they don't know yet, unfortunately. So it's either
17 going to be Terra Haute or ADX, but no one knows right now
18 where he's going.

19 MS. CLARKE: Well, if they're thinking about tomorrow
20 afternoon, I would think they might need to know where to
21 direct the plane --

22 MR. MELLIN: I've asked for some clarification how
23 that was going to occur but there was no more information on
24 that.

25 THE COURT: I know the probation officer got an

1 inquiry from BOP if they could see the PSR in advance of the
2 sentencing.

3 MS. CLARKE: They have him in their custody so...

4 THE COURT: Right. But I think that suggests that
5 they were working on something.

6 MS. CLARKE: Thank you.

7 THE COURT: I take it there are no issues to be
8 resolved with the PSR?

9 MS. CLARKE: No.

10 THE COURT: There was a hypothetical one from the
11 government on obstruction of justice, but it has absolutely no
12 effect on anything.

13 MS. CONRAD: And I just raise some issues about -- you
14 know, I think this really affects just the judgment in terms of
15 the statutory maxes; for example, I just had this experience.
16 Probation says this is a guideline sentence and then there's a
17 tendency to create a judgment that says concurrent on these
18 counts; whereas, Counts 19 and 21 do have term of years max.
19 So it shouldn't be life on those.

20 THE COURT: Correct.

21 MS. CONRAD: And then there's -- I think there's a
22 question about whether you can impose supervised release after
23 a term of life imprisonment. It seems kind of fallacious --

24 THE COURT: I guess.

25 MS. CONRAD: -- because it suggests that he's ever

1 going to be released in order to be on supervised release. You
2 certainly can impose it, I suppose, after --

3 THE COURT: I can impose it.

4 MS. CONRAD: -- on 19 and 21 in case those sentences
5 are vacated. But it seems, you know -- if you can't impose the
6 supervised release after a death sentence, you certainly can't
7 impose one after a life sentence and vice versa.

8 MS. CLARKE: But, no, other than financial issues, I
9 don't think there's much --

10 MS. CONRAD: I don't know if there is an issue, and I
11 assume no one's asking for a fine?

12 MR. WEINREB: We're not asking for a fine.

13 THE COURT: I actually didn't focus on that in the
14 PSR. I don't think she did. She didn't recommend it to me
15 anyway. She just sets out the ranges.

16 So we found this regulation, 28 C.F.R. Section 26.2.
17 Well, 26.1 and 2. 26.1 says the regulations of this part apply
18 whenever a sentencing hearing is conducted by a United States
19 District Court -- conducted in a United States District Court
20 has resulted in a recommendation or determination that a
21 criminal defendant be sentenced to death for the commission of
22 an offense described in any federal statute; and then the
23 second part is, Whenever this part becomes applicable, the
24 attorney for the government shall promptly file with the
25 sentencing court a proposed judgment and order. And it shall

1 state in addition to other matters required by law that the
2 sentence will be executed by a U.S. marshal designated by the
3 director of the marshal service; that it shall be executed by
4 intravenous injection of a lethal substance; that it should be
5 executed on a date and place designated by the director of the
6 Bureau of Prisons; and that the prisoner be committed to the
7 custody of the attorney general for detention pending execution
8 of the sentence.

9 MR. MELLIN: Your Honor, it's been my experience that
10 courts just -- the judge just reads that as an order from the
11 Court, but we could certainly --

12 THE COURT: There seems to be some range of options
13 there, I guess. Or maybe not. Well, maybe -- maybe that's the
14 answer, you just incorporate those conditions in the judgment,
15 leaving it to the attorney general or his designee -- her
16 designee to fill in the blanks, I guess. Okay. Well, that
17 covers the judgment issue.

18 We made reference to the motion from the press for
19 juror identification. We've held off on that. I don't know if
20 anybody wants to weigh in on that.

21 MS. CLARKE: We don't intend to.

22 THE COURT: I don't know whether the government does.
23 But if you do, I think that two weeks from maybe this Friday or
24 next -- yeah. So if you have anything to say -- I'm thinking
25 seriously about -- I think these cases are not routine and

1 every case has to be considered on its own, so I don't know
2 what the answer is. But if you have any input, I would be
3 interested in it. If you don't, that's fine too.

4 I guess that's all I have.

5 MS. CLARKE: Okay. 9:30.

6 THE COURT: I'll see you tomorrow at 9:30.

7 Oh, yeah. Jane just reminds me. I think to avoid
8 pressure on the returning former jurors, I'd appreciate it if
9 there was no comment to the media about it before tomorrow.

10 MS. CLARKE: We've been just yakking away with the
11 media all along.

12 THE COURT: Just make it easier for them.

13 (The proceedings adjourned at 2:38 p.m.)

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1 C E R T I F I C A T E
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I, Marcia G. Patrisso, RMR, CRR, Official Reporter of
the United States District Court, do hereby certify that the
foregoing transcript constitutes, to the best of my skill and
ability, a true and accurate transcription of my stenotype
notes taken in the matter of Criminal Action No. 13-10200-GAO,
United States of America v. Dzhokhar A. Tsarnaev.

9
10 /s/ Marcia G. Patrisso.
11 MARCIA G. PATRISSO, RMR, CRR
12 Official Court Reporter

13 Date: 2/5/16

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